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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 341

SANTIAGO ALBANESE D'IMPERIO, *Petitioner*

v.

SECRETARY OF THE TREASURY OF PUERTO RICO

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

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San Juan, Puerto Rico

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

SECRETARY OF THE TREASURY OF PUERTO RICO

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

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The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit which affirmed a judgment of the Supreme Court of Puerto Rico refusing to set aside a tax deficiency assessed against petitioner for the year 1949.

## OPINIONS BELOW

The opinion of the Court of Appeals, set forth in the Appendix, infra, is reported at .
The opinion of the Supreme Court is reported in 76 D.P.R. 324.[1]

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[1] Not yet reported in English edition.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether Section 24 of the Income Tax Statute of Puerto Rico (Act No. 74 approved August 6, 1925, as amended by Act No. 31, approved April 12, 1941, and effective from January 1st, 1940) seeking to impose an income tax on appellant, and providing for consolidating to his income for the year 1949 income accruing to and derived from the separate property of his wife, does violence to the "due process clause" of the Fourteenth Amendment to the Constitution of the United States, as well as to Article 2, Section 7 of the Constitution of the Commonwealth of Puerto Rico and to Section 2, paragraph 1 of the Organic Act of March 2, 1917, known as "The Jones Act". 39 Stat. 951.

## STATUTES

1. The "Due Process Clause" of the Fourteenth Amendment of the Constitution of the United States.

2. Article 2, Section 7 of the Constitution of the Commonwealth of Puerto Rico.

3. Section 2 of the Organic Act of March 2, 1917, known as "The Jones Act". 39 Stat. 951.

4. Section 24 of the Income Tax Statute of Puerto Rico (Act No. 74, approved August 6, 1925, as amended by Act No. 31, approved April 12, 1941, and effective from January 1st, 1940).

5. Sections 155 to 162, 761-763, and 1267-1278 of the Civil Code of Puerto Rico, 1930 Edition.[2]

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[2] The provisions of the Civil Code of Puerto Rico are set out at length in the appendix hereto.

## STATEMENT

The petitioner seeks to set aside and annul a tax deficiency assessed against him by the Secretary of the Treasury of Puerto Rico for the year 1949, resulting from the consolidation of the separate income reported respectively by himself and his wife for said year, which income after consolidation with that of his wife and recomputation resulted in a higher tax.

According to an agreed statement of facts filed of record in the Court of Appeals, the appellant and his wife, both of whom were widowed, and each then having minor children living from their respective former marriages, prior to their marriage entered into a legally sanctioned and bona fide antenuptial agreement in which all requisite legal formalities were observed, pursuant to the provisions of Sections 1267 to 1278 of the Civil Code of Puerto Rico (1930 Ed.) and did establish a complete and absolute separation of each spouse's property and income and expressly negated and disavowed any intention that their marriage to be should be governed or controlled by the legal conjugal partnership system.[3]

The parties to said antenuptial agreement in effect were married to each other on January 27, 1949, and the said antenuptial agreement remained in full force and effect without suffering any modification, alteration or amendment. No questions have been raised that the agreement was one entered into in good faith

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[3] Marriages in Puerto Rico, *in the absence of antenuptial agreements pursuant to Sections* 1267 to 1278 of the Civil Code, are presumed to be governed by community property concepts.

or that the contracting parties have dealt with their respective properties as provided in the agreement.[4]

The Petitioner and his wife, in reporting their respective incomes for the year 1949, filed separate returns and each paid the corresponding tax as computed on their individual income.

The Respondent, on December 14, 1951, notified Petitioner with a tax deficiency on his return for the year 1949 amounting to $551.63. Petitioner, after exhausting the administrative remedies, petitioned the extinct Tax Court of Puerto Rico to review Respondent's action and annul and set aside the said deficiency.

The Superior Court, Successor to the Tax Court, denied the petition and sustained the deficiency by judgment entered February 5, 1953, holding that The Legislature of Puerto Rico for tax purposes *could make* an economic unit of husband and wife due to assumed considerations and advantages of the matrimonial relationship (*even though the agreement which governed the matrimony allowed each one of the spouses to have a vested or separate interest in their respective properties, separate from the other*) without violating the constitutional provision prohibiting the taking of property without due process.

An appeal was taken to the Supreme Court of Puerto Rico and said court on the 13th day of April 1954

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[4] Respondent in his brief filed in the Circuit Court states:
"But appellee does not question appellant and his wife's rights to enter into agreements as to the private consequences of their marriage, as they could also lawfully agree as to the absolute power of each one to dispose of, manage and control their separate property or income, as they could agree as to other aspects of their marriage."

entered judgment affirming the Superior Court, sustaining the validity of the tax deficiency.

In passing upon the constitutional question raised in the appeal the Supreme Court of Puerto Rico ruled that there was no constitutional prohibition which impeded the Commonwealth of Puerto Rico of treating the separate property of each spouse as one economic entity irrespective of the pre-marriage contract establishing the separation of property between husband and wife and of imposing a tax on the combined income.

## REASONS FOR GRANTING THE WRIT

1. The validity or present authority of *Hoeper* v. *Tax Commissioner of Wisconsin,* 284 U. S. 206 is in issue. To determine its proper scope or remaining influence or value as a precedent, it is appropriate that this Court grant certiorari.

While it is true that the many attempts to extend the *Hoeper* case to situations not encompassed within its peculiar facts have been repeatedly resisted by this Court,[5] the *Hoeper* case, *on its facts,* stands unchallenged.

The Circuit Court has for all practical purposes dismissed the *Hoeper* case as retaining no authority whatsoever and it is submitted that due to the similarity of the statutory provisions and the facts of the *Hoeper* case to the present one, it becomes extremely

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[5] *Helvering* v. *Horst,* 311 U.S. 112; *Burnet* v. *Leininger,* 285 U.S. 136; *Burnet* v. *Wells,* 289 U.S. 670; *Helvering* v. *Clifford,* 309 U.S. 331; *Helvering* v. *Stuart,* 317 U.S. 154.

important for this Court to re-examine *Hoeper* v. *Tax Commissioner of Wisconsin* (supra).[6]

2. Petitioner's income tax as in the *Hoeper* case, has been measured, not alone by his own income, but, in part, by that of another and in the light of the opinions of the lower courts it has become extremely important that the Supreme Court again pass upon this important and fundamental constitutional concept.

3. The statutes involved in the *Hoeper* case, supra and in the present case are substantially similar and read respectively as follows:

The Wisconsin statute;

"Sec. 71.09 (4) (c) 'Married persons living together as husband and wife may make separate returns or join in a single joint return. In either case the tax shall be computed on the combined average taxable income. The exemptions provided for in subsection (2) of S. 71.05 shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the average income of each bears to the combined average income.' "

The Puerto Rico statute;

"Section 24 (b) If a husband and wife living together have a net income for the taxable year of $2,000, or over, or an aggregate gross income for such year of $5,000 or over, the total income of both shall be included in a single joint return, and the normal and additional tax shall be computed on the aggregate income. The net or gross

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[6] *Hoeper* v. *Tax Com. of Wisc.* is still cited as controlling precedent; *Commissioner* v. *Clark* (1953), 202 F. 2d at 100; *Caldwell* v. *Campbell,* 218 F. 2d at 571, and many other Circuit District and State Courts.

income received by anyone of the spouses shall not be divided between them."

4. The antenuptial agreement entered into by petitioner and his wife is admittedly bona fide and indisputably has effected *a real and binding absolute separation* of property and income between husband and wife under the substantive law of Puerto Rico and is a legally enforceable agreement as between the spouses themselves and equally affects the rights of their children, creditors and other third parties.[7]

5. The agreement of the parties being valid and sanctioned by existing law and having effected a complete separation of properties and incomes has in effect created two separate and distinct economic units which may not be arbitrarily ignored, amalgamated or joined for purposes of taxation, without at least first amending or repealing the substantive laws which authorize and sanction such agreements.[8]

6. The provisions of the Civil Code of Puerto Rico cited in note 3, Page 3, supra, authorize persons about to contract matrimony to elect *before their marriage* whether they also desire to enter into an economic partnership, in which event they need do nothing, or whether on the contrary, they prefer not to join in such

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[7] The Supreme Court of Puerto Rico at Page 327 of its opinion (Spanish Edition) states:

"Both the appellant and the appellee admit that the problem presented in the instant case is new in this jurisdiction. We agree."

[8] No doubt that the legislature has the power to and could well do what the lower courts have said it could, but the fact remains that it has not seen fit to do so, and contrary to the opinion of the courts below the section of the Puerto Rico Income Tax Act relied upon does not accomplish the end sought.

partnership and instead create for themselves two separate and distinct economic units. The petitioner and his wife elected the latter.

7. No evidence having been offered and no finding having been made that the antenuptial agreement was a sham or a mere device to avoid taxes the same stands as a legally binding agreement against which no suppositious presumptions may be entertained.[9]

8. The test of ownership still continues to be the basis for taxation of income, and income is taxable to him who owns it. Family relationships do not create a status[10] which by themselves determine tax questions.

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[9] Appellee in his brief in the Circuit Court states:—

"Furthermore, we cannot agree with appellant in that the only rational constitutional basis on which the appealed decision can stand is that the pre-marital agreement is merely a sham or device to avoid taxation. Certainly, there is in the case at bar no evidence presented by the appellee to the effect that the pre-marital agreement is a purely artificial device to split income producing properties in two separate channels in order to minimize surtax. But no one can question that, regardless of the purpose, that result was achieved. And no such evidence was presented, nor did it appear necessary to do so in the Horst case, nor in the Eubank case, nor in the Tower case, nor in any one of the cases where the contention was unsuccessfully made that legal ownership is the criterion of taxability."

[10] *Commissioner* v. *Culbertson*, 337 U.S. 733.

"In plain English, if an arrangement among men is not an arrangement which puts them all in the same business boat, then they cannot get into the same boat merely to seek the benefits of §§ 181 and 182. But if they are in the same business boat, although they may have varying rewards and varied responsibilities, they do not cease to be in it when the tax collector appears."

337 U.S. at 754.

The Courts below have recognized the existence of a valid separation of property under valid law, but refuse to give it effect when confronted with the tax statute.

9. No provision of the Income Tax Act of Puerto Rico can be pointed to which even impliedly can be said to contemplate an amendment to the sections of the Civil Code (referred to in the notes supra) which allow prospective spouses *prior to their intended* marriage to arrange by antenuptial agreement for a separation of their present or future properties and income and to provide for the creation of two separate and distinct economic units with all the safeguards that the Civil Code throws around these agreements and all of which were scrupulously observed by petitioner and his wife.

10. The antenuptial agreement in the present case must be examined not only having regard to the economic convenience of Petitioner and his wife, but by far more weighty considerations involving individual rights of inheritance and to income by children of each of the spouses begotten from their respective former marriages.[11] Examined under this light,[12] *even in the* absence of a tax statute, or a presumed tax avoidance motive, it will be observed that the antenuptial agreement was a real and necessary instrument *to preserve the separate estates and the income therefrom to those who owned them* prior to the marriage, i. e. a purpose far superior to that of avoiding a tax (since the tax after all could only reach the income); the agreement

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[11] See Civil Code provisions set out in Appendix.

[12] Substantial property rights belonging to the respective children of each spouse by former marriages and held in common with their respective parents prior to their second marriage are revealed by the record and agreed statement of facts below.

of the parents guaranteed the retention of the corpus of the property in their original owners and prevented future intermingling and confusion of rights and titles as between children of different marriages and preserved to them what was theirs before and which they had acquired and were enjoying as a result of having inherited said properties from their deceased parents.

11. The decision whose review is sought, if allowed to stand, will seriously and irreparably upset, affect and impair substantial property rights of the children of each spouse and compel economic dislocations and complications not capable of readjustments and bring about an unlawful taking of said property or of the income therefrom.

12. The provisions of the Civil Code referred to in this petition are unquestionably the prevailing substantive law of Puerto Rico unaltered and unamended since Spanish times. No legal or statutory justification therefore exists for the statement of the Circuit Court of Appeals that Puerto Rico has enacted legislation *"forbidding spouses from thereafter escaping the normal income tax consequences of their marital relationships by contractual arrangements entered into before or after the marriage."*

This statement of the Circuit Court must refer to Section 24 of the Income Tax Act of Puerto Rico (since there is no other statutory provision upon which such statement can be predicated), and it is submitted that a general tax statute which contemplates the normal Puerto Rican marriage relationship ordinarily contracted under the conjugal partnership system cannot and should not be used as statutory authority for upsetting deep rooted fundamental concepts of long standing under Civil Law.

13. To permit a general tax statute to invade by implication fundamental systems of property ownership, inheritance, usufruct and other cardinal provisions of an integrated system of law is to disrupt the established substantive law of a state to conform it to the tax statute, and to permit the "tail to wag the dog".

14. Both the Circuit Court and the Supreme Court of Puerto Rico have unquestionably given more weight to the case of *Ballester* v. *Court of Tax Appeals,* 142 F. 2d 11, cert. denied, 323 U. S. 723, than to *Hoeper* v. *Tax Commissioner of Wisconsin,* supra, although both courts frankly admit that the *Ballester* case does not rule this one.[13]

15. Lastly, a construction is placed by the Circuit Court on the provisions of the Civil Code of Puerto Rico, authorizing the separation of properties of spouses by antenuptial agreements, which clearly appears unwarranted. In this connection reference is made to a phrase in section 1268 of the Code (See appendix p. ) that "the parties to antenuptial contracts can not stipulate anything contrary to law . . .". Clearly, such a provision refers to acts "malum in se" or "malum prohibitum", but never, we submit, to

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[13] "Basically the appellant's contention is that the antenuptial agreement between himself and his wife is clearly valid under local law (indeed, he says that there is not even an iota of evidence that its purpose was to avoid taxes or that it was in any respect a sham or subterfuge) and that, by its clear terms, the agreement effected a complete separation not only of the properties but also of the incomes of the spouses. Wherefore he says that to require him to pay a tax on his and his wife's combined income is to require him to pay a tax measured by the income of another which the Supreme Court held in *Hoeper* v. *Tax Commission,* 284 U.S. 206 (1931) violated the due process clause of the Fourteenth Amendment." See page Appendix.

thwart the very nature of the acts and consequences that the statutory provisions contemplate.

Should Section 24 of the Income Tax Act invoked, be construed as an amendment to the provisions of the Civil Code of Puerto Rico, which we submit it is not, then such section 24 would do violence to the provisions of the Organic Act of Puerto Rico, Sect. 34; Mar. 2, 1917, C. 145, Sect. 34, 39 Stat. 960; amended June 24, 1948, C. 610, Sect. 3, 62 Stat. 580.[14]

Certiorari is appropriate herein to authoritatively settle the proper scope and present validity of *Hoeper* v. *Tax Commissioner of Wisconsin,* supra.

## CONCLUSION

In view of the importance of the questions presented, as it affects a serious attempt to measure one person's income by that of another, it is respectfully submitted that a writ of certiorari should issue to review the judgment below and re-examine the present status as a judicial precedent of *Hoeper* v. *Tax Commissioner of Wisconsin,* supra.

Respectfully submitted,

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[14] "No bill except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.

No law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length."

# APPENDIX

## APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. 4869

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SANTIAGO ALBANESE D'IMPERIO, *Plaintiff, Appellant,*

v.

SECRETARY OF THE TREASURY OF PUERTO RICO,

*Defendant, Appellee.*

**Appeal from the Supreme Court of Puerto Rico.**

Before MAGRUDER, *Chief Judge,* and MARIS* and WOODBURY, *Circuit Judges.*

Orlando J. Antonsanti for appellant.

Manuel J. Medina Aymat, Assistant Attorney General, with whom José Trias Monge, Attorney General of Puerto Rico, was on brief, for appellee.

**Opinion of the Court**

June 6, 1955

Woodbury, Circuit Judge. This is an appeal from a judgment of the Supreme Court of Puerto Rico affirming a judgment of the Superior Court of Puerto Rico, San Juan Part, which sustained administrative action resulting in the assessment of a deficiency in income tax against the appellant for the calendar year 1949. Our appellate jurisdiction under Title 28 U.S.C. S. 1293 is clear, for the appellant contends in this court as he did in both insular courts that S. 24 (b) of the Income Tax Act of Puerto

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* By special designation.

Rico, quoted in the margin,[1] as applied to him, deprives him of his property without due process of law in violation of the Constitution of the United States,[2] as well as in violation of Art. II, S. 7 of the Constitution of the Commonwealth of Puerto Rico and S. 2 of the Organic Act of March 2, 1917, known as the Jones Act. 39 Stat. 951.

The case is presented to us on an agreed statement of fact which can be briefly summarized. In January 1949, the appellant, a widower, and Iris de Juan, a widow, both with minor children born of their previous marriages, entered into an antenuptial agreement pursuant to the provisions of Book Fourth, Title III, Chapter I of the Civil Code of Puerto Rico, 1930 ed., the pertinent sections of which are quoted in the margin.[3] They included in the agree-

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[1] Act No. 74 of August 6, 1925 as amended by Act No. 31 of April 12, 1941, effective January 1, 1940.

> "If a husband and wife living together have a net income for the taxable year of $2,000 or over, or an aggregate gross income for such year of $5,000 or over, the total income of both shall be included in a single joint return, and the normal and additional tax shall be computed on the aggregate income. The net or gross income received by anyone of the spouses shall not be divided between them."

[2] In this case as in Mora v. Mejias, 206 F. 2d 377, 382 (C.A. 1, 1953) we do not find it necessary to decide whether the due process clause of the Fifth Amendment or that of the Fourteenth Amendment is applicable for: "The restraint imposed upon (tax) legislation by the due process clauses of the two amendments is the same." Heiner v. Donnan, 285 U.S. 312, 326 (1932).

[3] Section 1267.—Persons who may be joined in matrimony may, before celebrating it, execute contracts, stipulating the conditions for the conjugal partnership with regard to present and future property, without any other limitations than those mentioned in this Code.

In the absence of contracts relating to property it shall be under-

ment a complete inventory of all their respective properties and by the agreement they undertook to effect a complete separation, not only of the property each then owned, but also of all property each might acquire in the future. Furthermore, in clause 6 they provided: "The parties hereby make known that having excluded from the marriage they are about to contract, the regime of the legal conjugal partnership (régimen de la sociedad legal de gananciales), the property that during the marriage each spouse shall acquire, shall be and become the property of each in absolute dominium."

The parties married on January 27, 1949 in accordance with their agreement, and in reporting their income for that year each filed a separate return and each paid a tax calculated on his and her respective income. The Secretary of the Treasury, however, took the position that S. 24 (b) of the Income Tax Act quoted above applied in spite of the antenuptial agreement. He, therefore, ruled that the appellant should have reported both his and his wife's income in a single joint return and paid a tax calculated on the total taxable income of both. Therefore the Secretary assessed a deficiency against the appellant in the amount of the difference between the tax due on his and his wife's combined income and the tax actually paid by the appellant on his own personal income. The appellant contested the assessment of his deficiency through the administrative remedies provided by local law and on up through the Puerto Rican courts wherein, as already pointed out, he

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stood that the marriage has been contracted under the system of legal conjugal partnership.

Section 1268.—In the contracts referred to in the preceding section the contracting parties can not stipulate anything contrary to law or morality, nor humiliating to the authority within the family pertaining respectively to the future spouses.

All stipulations not in accordance with the provisions of this section shall be considered void.

raised the same federal constitutional question he presents on this appeal.

Basically the appellant's contention is that the antenuptial agreement between himself and his wife is clearly valid under local law (indeed, he says that there is not even an iota of evidence that its purpose was to avoid taxes or that it was in any respect a sham or subterfuge) and that, by its clear terms, the agreement effected a complete separation not only of the properties but also of the incomes of the spouses. Wherefore he says that to require him to pay a tax on his and his wife's combined income is to require him to pay a tax measured by the income of another which the Supreme Court held in Hoeper v. Tax Commission, 284 U.S. 206 (1931) violated the due process clause of the Fourteenth Amendment.

The Supreme Court of Puerto Rico, relying heavily on its opinion in Ballester v. Court of Tax Appeals, 61 P.R.R. 460 (1943), rejected this contention.

Although the Commonwealth of Puerto Rico, by direct inheritance of the law of Spain, has always had a legal community property system, see Chapter IV of Title III Book Fourth of the Civil Code of Puerto Rico, 1930 ed., the court in Ballester v. Court of Tax Appeals, supra, held that under its system of community property the wife did not have a "vested interest" in income earned by the husband or produced by community property. Wherefore it found Hoeper v. Tax Commission, supra, readily distinguishable and held that under the rule of United States v. Robbins, 269 U.S. 315 (1926) there was no constitutional impediment to applying S. 24(b) of the Income Tax Act to require a husband to report and pay the income tax on the entire net income of the conjugal partnership. This court affirmed. 142 F. 2d 11 (1944), cert. denied, 323 U.S. 723 (1944).

The Ballester case does not rule this one, for the spouses in that case married under the traditional community prop-

erty system and the taxpayer's position was that as an incident of that system one half of the income of the community "vested" in his wife and so could not constitutionally be taxed to him under the rule of Poe v. Seaborn, 282 U.S. 101 (1930). In the case at bar, however, the spouses married in accordance with an antenuptial agreement excluding "the regime of the legal conjugal partnership" and providing for a complete and final separation of their respective properties and incomes, and the taxpayer relies upon the terms of that agreement to effect the separation of his and his wife's respective incomes for income tax purposes. Nevertheless, we agree with the Supreme Court of Puerto Rico that the result reached in the Ballester case must also be reached in this one.

Certainly there is nothing in Hoeper v. Tax Commission, supra, if that case still speaks with authority, see Ballester v. Descartes, 181 F. 2d 823, 829 (C.A. 1, 1950), to indicate the existence of any constitutional limitation on the power of the Legislature of Puerto Rico, or for that matter of a State in the federal union, to enact legislation forbidding spouses from thereafter escaping the normal income tax consequences of their marital relationship by contractual arrangements entered into either before or after their marriage. And we think the local statutes have precisely this effect.

The reason for our conclusion can be briefly stated. It is that S. 1268 of the Civil Code, quoted in footnote 3 supra, specifically provides that the parties to antenuptial contracts "can not stipulate anything contrary to law," and if they do, that provision of their contract "shall be considered void," and S. 24(b) of the Income Tax Act, making a husband and wife living together a unit for income tax purposes had been the "law" in Puerto Rico for some nine years before the appellant and his wife entered into their antenuptial agreement. Thus, while their antenuptial agreement is no doubt valid under local law

for many purposes, we do not think that local law permits it to have any validity as a device to divide their respective incomes for income tax purposes. And, as we have said, we are not aware of any constitutional limitation on the power of the Legislature to forbid, at least prospectively, contracts between a husband and wife altering the normal income tax consequences of their marriage.

The Supreme Court of Puerto Rico was not concerned, nor are we, with the question whether the same result would be reached with respect to an antenuptial agreement like the present which had been entered into prior to the enactment of S. 24(b) of the Income Tax Act. We express no opinion on that question.

The judgment of the Supreme Court of Puerto Rico is affirmed.

**Sections of the Civil Code of Puerto Rico Bearing Upon This Case**

Section 155.—Property acquired by an unemancipated child by labor or industry, or for any valuable consideration, belongs to the said child, but the usufruct thereof belongs to the parents having potestas over him whilst he lives in their company; but if the child, with the consent of his parents, lives independently, he shall be deemed emancipated for all effects as regards the said property, and he shall be the full owner and have the usufruct and administration thereof.

Section 156.—The father or mother possesses the ownership and usufruct of whatever property the child may acquire with the capital of each of his parents. Nevertheless, if the father or mother expressly allow the child the whole or part of his gains, the same shall not be charged against his inheritance.

Section 157.—Property or income donated or left by will for the expenses of education and instruction of a child shall belong to him in property and usufruct; but his

father or mother shall have the administration thereof, if in the donation or legacy it be not otherwise provided, and in the latter case the will of the donors shall be strictly followed.

Section 158.—(Section 228, Civil Code of 1902, as amended by act No. 48, 1930, p. 368.) The parents, as regards the property of a child in which they possess the usufruct or administration, have the same obligations as any other usufructuary or administrator, as well as the special obligations on legal mortgage established in the Mortgage Law.

An inventory shall be made, with the intervention of the public attorney, of the property of children of which the parents have only the administration; and, on petition of the said public attorney, the district court may decree that the securities belonging to the child be placed in deposit.

Section 159.—(Section 229, Civil Code of 1902, as amended by acts of March 9, 1911, p. 118, and No. 48, 1930, p. 368.) The exercise of the patria potestas does not authorize the father or the mother to alienate or lay any encumbrance upon real property of any class whatever, or upon personal property, the value of which exceeds five hundred dollars, pertaining to the child and which may be under the administration of its parents, without the previous authorization of the district court wherein the property is situated and the demonstration of the necessity and utility of the alienation or encumbrance and in accordance with the provisions of the law relative to special legal proceedings.

Notwithstanding the prescriptions of the preceding paragraph, no judicial authorization shall be required for the sale of fruits yielded by an agricultural property at its last crop.

For the execution of contracts for the lease of real property, including those of advances for agricultural

purposes and grinding of cane authorized by the act of March 10, 1910, covering a longer period than six years, the authorization provided for in the preceding paragraph shall also be required; but in no case shall the contract be entered into nor the authorization granted for a lease covering a period of time in excess to that required by the child, not otherwise incapacitated, to become of age.

Section 160.—Whenever, in any matter, the father or mother have interests opposed to those of their unemancipated children, the district court shall appoint for the latter a person to defend their interests, who shall represent them in or out of court.

The district court, on petition of the father or mother, the minor himself, the public attorney or any other person capable of appearing in a suit, shall appoint, as the person to defend the interests of the said unemancipated child, the relative who, in a proper case, would act as his tutor by effect of the law, and, in his default, to another relative or any other person.

Section 161.—Parents acknowledging or adopting children do not acquire the usufruct of the property of such acknowledged adoptive children, nor shall they have the administration thereof, unless they give bond as security for the results of such administration, to the satisfaction of the district court of the domicil of the minor, or of the persons who must concur in said adoption.

Section 162.—In case of divorce, the usufruct of the property of unemancipated children shall belong, in accordance with the provisions contained in the preceding sections, to the father or mother in whose favor the decree of divorce was given.

Section 761.—(Section 8, act of March 9, 1905, as amended by Act of March 9, 1911, p. 234, Comp. of 1911, No. 3880). The widower or widow who, on the death of his or her spouse is not divorced, or should be divorced through the fault of the deceased spouse, shall have a right to a portion

in usufruct equal to that corresponding by way of legal portion to each of the legitimate children or descendants who have not received any advantage or extra portion.

If only one legitimate child or descendant shall survive, the widower or widow shall have the usufruct of that third which is authorized by law to be applied to advantages or extra portions, the former preserving the naked ownership until, on the death of the surviving spouse, the full title is merged in him.

If the spouses are separated by a suit for divorce, the result of the suit shall be awaited.

The provisions of this section and of the subsequent sections 762, 763, 764, 765 and 766 of this Code, shall apply in like manner to the intestate as well as the testate succession.

Section 762.—(Section 9, act of March 9, 1905, Comp. of 1911, No. 3881.) The hereditary portion alloted in usufruct to the surviving spouse must be taken from that part of the estate which the testator is permitted by law to apply to advantages or extra portions.

Section 763.—(Section 10, act of March 9, 1905, Comp. of 1911, No. 3882.) Should the testator not leave any descendants, but only ascendents, the surviving spouse shall have a right to the third of the estate in usufruct.

This third shall be taken from the free half, the testator being allowed to dispose of the ownership of the same.

Section 1267.—Persons who may be joined in matrimony may, before celebrating it, execute contracts, stipulating the conditions for the conjugal partnership with regard to present and future property, without any other limitations than those mentioned in this Code.

In the absence of contracts relating to property it shall be understood that the marriage has been contracted under the system of legal conjugal partnership.

Section 1268.—In the contracts referred to in the preceding section the contracting parties can not stipulate anything contrary to law or morality, nor humiliating to the authority within the family pertaining respectively to the future spouses.

All stipulations not in accordance with the provisions of this section shall be considered void.

Section 1269.—There shall also be considered as void and as not written in the contracts mentioned in the two preceding sections the stipulations by which the contracting parties in a general manner determine that the property of the spouses shall be submitted to the local laws and special customs and not to the general provisions of this Code.

Section 1270.—A minor who can marry in accordance with law may also execute his marriage contract, but it shall be valid only when in its execution the persons designated by law to give consent to the minor to contract marriage take part therein.

In case the marriage contract should be void, because the concurrence and signature of the said persons are lacking and the marriage, however, is valid according to law, it shall be understood that the minor has contracted it under the system of conjugal partnership.

Section 1271.—In order that any change in the marriage contract be valid it must be made before the celebration of the marriage and in the presence and with the concurrence of the persons who took part in the contract as contracting parties. The attendance of the same witnesses shall not be necessary.

Any of the persons who attended the execution of the original contract can only be substituted by another, or his attendance may not be required when, by reason of death or any other legal reason, at the time of the execution of the new stipulation or the modification of the

preceding one, attendance is impossible or should not be necessary according to law.

Section 1272.—After the marriage has been celebrated, the marriage contract executed prior thereto can not be changed, whether present or future property is involved.

Section 1273.—Marriage contracts and modifications made therein must be contained in a public instrument executed before the celebration of the marriage.

Property in the condition referred to in section 1276 is excepted from the preceding rule.

Section 1274.—Any modification which may be made in the marriage contract shall have no legal effect with regard to third persons if it does not include the following conditions:

1. That in the proper protocol, by a marginal note, reference be made to the notarial act or instrument containing the modification of the previous contract; and

2. That in case the original contract may be entered in the registry of property, the instrument by which it has been modified, be also entered.

The notary shall state these modifications in the authenticated copies of the stipulations or original contract he may issue, under the penalty of indemnifying the parties for losses and damages should he not do so.

Section 1275.—For the validity of a marriage contract, executed by a person against whom a sentence of civil interdiction of incapacity has been rendered, or against whom a suit for the same cause has been instituted, the attendance and consent of the guardian shall be indispensable, who for this purpose shall be appointed, by the proper persons, according to the provisions of this Code and of the Law of Civil Procedure.

Section 1276.—Whenever the property brought by the spouses is not real estate, and that of the husband and

wife together does not exceed five hundred dollars and there should be no notary in the town of their residence, the marriage contract may be executed before the secretary of the municipal council and two witnesses, who shall state, on their liability, that they know said property has been delivered or that it has been brought to the marriage, as the case may be.

The original contract or contracts shall be preserved in the registry in the archives of the proper municipality.

When, in the property brought to the marriage, whatever its value may be, there should be one or more estates, or the contracts relate to real property, they shall always be executed in a public instrument, before a notary, as prescribed in Section 1273.

Section 1277.—Should the marriage be contracted in a foreign country, between a Porto Rican and a foreign woman or between a foreigner and a Porto Rican woman, and the contracting parties should not state or stipulate anything with regard to their property, it shall be understood, when the husband is a Porto Rican, that he marries under the system of the legal conjugal partnership, and when the wife is a Porto Rican that she marries under the system of laws in force in the husband's country, all without prejudice to what is established in this Code with regard to real property.

Section 1278.—All that is agreed to in the stipulations or contracts referred to in the preceding sections, in contemplation of a future marriage, shall be void and of no effect in case the marriage does not take place.

FILED
SEP 21 1955
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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# No. 341

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SANTIAGO ALBANESE D'IMPERIO,
*Petitioner,*

*vs.*

SECRETARY OF THE TREASURY OF PUERTO RICO,
*Respondent*

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## RESPONDENT'S BRIEF IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1955**

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# No. 341

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SANTIAGO ALBANESE D'IMPERIO,
*Petitioner,*

*vs.*

SECRETARY OF THE TREASURY OF PUERTO RICO,
*Respondent*

---

## RESPONDENT'S BRIEF IN OPPOSITION

---

Petitioner prays the issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the first Circuit, affirming a judgment of the Supreme Court of Puerto Rico refusing to set aside a tax deficiency for the year 1949. Petitioner invokes the jurisdiction of this Court under 28 U. S. C. 1254(1), 1952 ed., and pleads that a writ of certiorari should issue to review the present status, as a judicial precedent, of *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206.[1]

### Point in Issue

The constitutional validity of section 24 of the former Income Tax Act of Puerto Rico (Act No. 74, approved

[1] Respondent presumes that Petitioner is invoking Rule 19(1)(a).

August 6, 1925, as amended by Act No. 31, approved April 12, 1941, effective January 1, 1940), which requires husband and wife living together to file a joint income tax return, when said section is applied to a husband who, prior to the marriage, entered into a pre-marital agreement with his wife wherein they stipulated the absolute separation of property between them as spouses.

## Statement of the Case

The case was presented to the Court below on an agreed statement of facts, briefly summarized as follows:

Petitioner and Iris de Juan, both of whom were widowed and each of them having minor children from their respective former marriages, prior to contracting matrimony for the second time, entered into an ante-nuptial agreement[2] which provided that said marriage would be contracted on the basis of an absolute separation of property between them[3] each one to administer and dispose of his or her respective property freely, thereby expressly excluding the regime of legal conjugal partnership. It was further agreed that said separation of property would govern all property that the future spouses may own at any time and any other property that in the future and by any title may be acquired by either, said separation extensive to rents, proceeds, divi-

---

[2] The ante-nuptial agreement was executed under the authority of Section 1267 of the Puerto Rico Civil Code, 1930 Ed., which provides as following:

> "Persons who may be joined in matrimony may, before celebrating it, execute contracts, stipulating the conditions for the conjugal partnership with regard to present and future property, without any other limitations than those mentioned in this Code.
>
> "In the absence of contracts relating to property it shall be understood that the marriage has been contracted under the system of legal conjugal partnership."

[3] In the absence of an ante-nuptial agreement to that effect, marriages in Puerto Rico are governed by the community property regime.

dends, increases in market value or by any other cause or increment of said property, and in the same manner to the rents, interest, fruits and dividends that the contracting parties would have a right to enjoy on or from the property of their respective minor children as usufructuaries of their said children while they remain minors and in their company and under their custody.[4]

The parties married on January 27, 1949 and, in reporting their income for that year, each filed a separate return and each paid a tax calculated on his and her respective income. Respondent, however, ruled that, in spite of the ante-nuptial agreement, petitioner should have reported both his and his wife's income in a single joint return and paid a tax calculated on the total taxable income of both. As a result, a deficiency was assessed against petitioner who contested it through the administrative remedies provided by local law, and through the Courts.

## Argument

Section 24 of the former Income Tax Statute of Puerto Rico, *supra*, originally provided as follows:

> ". . .
>
> (b) If a husband and wife living together have an aggregate net income for the taxable year of $2,500, or over, or an aggregate gross income for such year of $5,000 or over—
>
> (1) Each shall make such a return, or
>
> (2) The income of each shall be included in a

---

[4] Under Section 155 of the Puerto Rico Civil Code, 1930 Ed., "property acquired by an unemancipated child by labor or industry, or for any valuable consideration, belongs to the said child, but the usufruct thereof belongs to the parents having potestas over him, whilst he lives in their company"; and under sections 1301 and 1303 of said Code "the usufruct which the spouses have in the property of their children", belongs to the conjugal partnership, "even though they be of another marriage."

single joint return, in which case the tax shall be computed on the aggregate income.

. . . .

By Act No. 31, April 12, 1941, effective January 1, 1940, said section was amended in the following way:

". . .

(b) If a husband and wife living together have a net income for the taxable year of $2,000, or over, or an aggregate gross income for such year of $5,000 or over, the total income of both shall be included in a single joint return, and the normal and additional tax shall be computed on the aggregate income. *The net or gross income received by any one of the spouses shall not be divided between them.*"

Undoubtedly, the purpose of such amendment was merely a return "to the traditional concept of community property" by the elimination of "the incongruity originally resulting from slavishly copying the Federal Statute". *Ballester* v. *Court of Appeals*, 61 P. R. R. 460, 473.

The constitutional validity of said amended section was unsuccessfully questioned in the *Ballester* case, *supra*,[5] although, we must admit, the precise factual question raised in the case at bar was not decided, the *Ballester* case contemplating a legal conjugal partnership, as against a marriage under an absolute separation of property in this. Nevertheless, the *Ballester* case definitely established that the Legislature of Puerto Rico could require, in general, the filing of joint returns.

Petitioner contends that insofar as the Civil Code of Puerto Rico permits and authorizes the express exclusion of community property regime from marriage, and he and

---

[5] Affirmed, 142 F.2d 11; certiorari denied, 323 U.S. 723.

his wife expressly excluded it in the public deed executed prior to their marriage, respondent cannot attempt to, through interpretation of a tax statute, create an economic unit to defeat the purposes of the Civil Code in the absence of an express amendment to the Code.

The legal basis of petitioner's argument is *Hoeper* v. *Tax Commission of Wisconsin, supra.* But even admitting, *argumentatis causa,* that the *Hoeper* case is at present a good judicial precedent, we respectfully submit that there is a substantial difference between the factual situation in this and in the *Hoeper* cases.

Under the law of Wisconsin, "traditionally the wife's income is in the fullest degree her separate property and in no sense that of her husband," said the Court in the *Hoeper* case. That was the law when Hoeper married. After his marriage, the State changed the legal consequences of his marriage as affecting his income tax responsibilities.

In the case at bar, at the time of petitioner's marriage, our Income Tax Act was clear to the effect that the total income of both husband and wife was to be included in a single joint return. As the Supreme Court of Puerto Rico, stated, the statutory provision established no distinction between marriages celebrated under the community property system and those celebated under an absolute separation of the property of the spouses. Therefore, petitioner and his wife already knew, at the date of their marriage, what the legal consequences regarding their income tax responsibilities would be. Petitioner cannot now claim that the Legislature of Puerto Rico changed the situation or impaired his pre-nuptial agreement after his marriage.

Moreover, respondent does not question petitioner's rights to enter into agreements with his wife as to the private consequences of their marriage, as they could also

lawfully agree as to the absolute power of each one to di
pose of, manage and control their separate property
income, or agree as to other aspects of their marriag
However, they could not stipulate against the law,[6] and th
law, nine years before their marriage, had made matrimon
an economic unit for income tax purposes. We respectfull
submit that there can be no serious doubt as to the authorit
of the Legislature to do so.

> "So far as the Constitution of the United States
> concerned the legislature has power to determine wh
> the consequences of marriage shall be, and as it ma
> provide that the husband shall or shall not have certai
> rights in his wife's property and shall or shall not
> liable for his wife's debts it may enact that he shall
> liable for taxes on an income that in every probabili
> will make his life easier and help to pay his bills. Ta
> ation may consider not only command over but actu
> enjoyment of the property taxed. See *Corliss*
> *Bowers*, 281 U. S. 376, 378, 74 L. ed. 916, 917, 50 S.
> 336. In some States if not in all, the husband becam
> the owner of the wife's chattels on marriage witho
> any trouble from the Constitution and it would requi
> ingenious argument to show that there might not be
> return to the law as it was in 1800. It is all a matter
> statute. But for statute the income taxed would belon
> to the husband and there would be no question abo

---

[6] Although Section 1267 of the Civil Code, *supra*, permits and authoriz
the execution of pre-marital contracts, the next section limits such autho
zation as follows:

> "In the contracts referred to in the preceding section the contrac
> ing parties can not stipulate anything contrary to law or morali
> nor humiliating to the authority within the family pertaining r
> spectively to the future spouses.
>
> "All stipulations not in accord with the provisions of this sectio
> shall be considered void."

it." *Hoeper* v. *Tax Commission*, 284 U. S. 206, Dissenting Opinion by Holmes, Brandeis and Stone."

Even assuming, for the sole sake of argument, that the *Hoeper* case doctrine is applicable to the case at bar, "more recent cases clearly indicate that the rationale of the minority opinion in *Hoeper* v. *Wisconsin* rather than that of the majority opinion now holds sway". *Ballester* v. *Court of Appeals, supra.*

The *Hoeper* case was decided in 1931. More recent cases indicate that this court has refused to accept the principle that *legal* ownership is the criterion of taxability. Without trying to make an exhaustive list, the following cases clearly sustain our contention: *Lucas* v. *Earle*, 281 U. S. 111; *Corliss* v. *Bowers*, 281 U. S. 376; *Burnet* v. *Wells*, 289 U. S. 670; *Helvering* v. *Clifford*, 309 U. S. 331; *Helvering* v. *Eubank*, 311 U. S. 122; *Helvering* v. *Horst*, 311 U. S. 112; *Harrison* v. *Shaffner*, 312 U. S. 579; *Helvering* v. *Stuart*, 317 U. S. 154; *Commissioner of Internal Revenue* v. *Tower*, 327 U. S. 280.

Reported commentators also adhere to the above proposition. For example, Ray, *Proposed Changes in Federal Taxation of Community Property*, 30 Cal. L. Rev. 397, 432, if of opinion that, "in view of the overwhelming authority indicating how the Supreme Court would feel on the question, were it presented to that tribunal at the present time, there can be little doubt as to the constitutionality of a statutory provision taxing the income of a family as a unit", and Mertens, *Law of Federal Income Taxation*, Section 19.01, Vol 3, p. 7, indicates that "in view of the fact that under the law of the various community property states the husband is given the management and control of the community property, it is not unlikely that the Supreme Court might hold him taxable on the entire community income, thereby

in effect overruling the doctrine of *Hoeper* v. *Wisconsin* . . ."

Petitioner vigorously adheres to the, in our opinion, obsolete rule that the test of ownership is the basis for taxation of income, and that any attempt by a legislature to measure the tax on one person's income by reference to the income of another, is contrary to due process. But that rule can only stand in a forum where the refinements of titles and the mechanical application of logic is paramount over economic realities and experience.

The weight of authority apparently sustains that there is nowadays no constitutional barrier against imposing taxes to a husband upon the separate income of his wife or children.

> ". . . The constitutional objection urged against such a system of taxation would be that it results in an unreasonable discrimination aaginst spouses with separate incomes. However, such a contention is not sound. The family is an economic unit, at least in the vast majority of cases, and the husband whose wife has a separate income is subjected to a lighter financial burden than one whose wife is entirely dependent upon his income. The income of either spouse is usually available to meet family expenses, and as far as the actual enjoyment of it is concerned it makes little difference which spouse owns it." Bruton, *The Taxation of Family Income*, 41 Y. L. R. 1172, 1192.

More recently, in *Fernández* v. *Wiener*, 326 U. S. 340, 365 Mr. Justice Douglas, in a concurring opinion, stated the following:

> ". . . It was held, to be sure, in *Hoeper* v. *Tax Commission*, 284 U. S. 206, that a State could not assess against the husband an income tax computed on the

combined total of his and his wife's income. But I can see no reason why that which is in fact an economic unit may not be treated as one in law. For as Mr. Justice Holmes pointed out in his dissent, there is a community of interest 'when two spouses live together and when usually each would get the benefit of the income of each without inquiry into the source'. And he went on to say 'Taxation may consider not only command over, but actual enjoyment of, the property taxed'. 284 U. S. pp. 219-220. Cf. *Helvering* v. *Clifford*, 309 U. S. 331, 335-337.

"The Congress has not gone the full distance here. It has not included in one estate all the property owned by husband and wife. So far as this case is concerned, it has only included in the estate of the husband the accumulations which under the community property system are deemed to have been produced by the joint efforts of him and his wife. I can see no obstacle to that course unless, it be the uniformity clause of the Constitution."

Furthermore, we cannot agree with Petitioner in that the only rational constitutional basis on which the decision below can stand is that the pre-marital agreement is merely a sham or device to avoid taxation. Certainly, there is in the case at bar no evidence presented by the Respondent to the effect that the pre-marital agreement is a purely artificial device to split income producing properties in two separate channels in order to minimize surtax. But no one can question that, regardless of the purpose, that result was achieved. And no such evidence was presented, nor did it appear necessary to do so in the *Horst* case, nor in the *Eubank* case, nor in the *Tower* case, nor in any one of the cases where the contention was unsuccessfully made that legal ownership is the criterion of taxability.

It is very difficult to produce direct evidence in court as to the mental process of a person in doing a certain act. Evidence to that effect, if needed, always is circumstantial. But in the case at bar, Respondent does not charge Petitioner of any criminal responsibility. He merely just applied Section 24 of the Income Tax Statute, *supra* to Petitioner, since husband and wife living together were required under the said section to file a single joint return. Consequently, the question is not one of Petitioner's intention in executing the pre-marital agreement, but whether or not Section 24 referred to above is constitutionally valid as applied to Petitioner, notwithstanding the pre-marital agreement. We respectfully submit it is.

Finally, we respectfully submit that the Legislature has the absolute power to determine what, taxwise, the legal consequences of marriage shall be. The disputed section of the Income Tax Statute is one of its consequences, and said section has been unsuccessfully challenged as invalid in the Supreme Court of Puerto Rico. The holding of said Court, therefore, being a question of local law, must be upheld by this Court, unless inescapably wrong or manifestly erroneous. *Bonet* v. *Texas Co.*, 308 U. S. 463; *De Castro* v. *Board of Commissioners*, 322 U. S. 451; *National City Bank* v. *De la Torre*, 110 F. (2d) 976. We respectfully submit that it is not.

## Conclusion

The judgment of the United States Court of Appeals for the First Circuit is not in apparent conflict with *Hoeper* v. *Tax Commission of Wisconsin, supra,* and therefore the writ of certiorari prayed for, should not be granted.

Respectfully submitted,

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SEPTEMBER, 1955.

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